

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANK GARCIA

Claimant

VS.

TYSON FRESH MEATS

Self-Insured Respondent

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Docket No. 245,650

ORDER

Claimant requested review of the September 10, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 8, 2005.

APPEARANCES

Michael G. Patton, of Emporia, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ determined claimant suffers from a compensable occupational disease as defined by K.S.A. 44-5a01(b). The ALJ went on to find that claimant had a 10 percent functional impairment to the whole body. However, because he found that claimant suffers from an occupational disease and has sustained no loss of earning capacity, claimant is not, under the *Burton*¹ rationale, entitled to a monetary award for the effects of his injury.

¹ *Burton v. Rockwell International*, 266 Kan. 1, 967 P.2d 290 (1998).

The claimant requests review of the ALJ's denial of a monetary award. Claimant contends that he is entitled to the 10 percent functional impairment assigned by Dr. Bieri because he has suffered a loss of earning capacity as a result of his work-related injuries because of the following reasons:

1. The claimant is unable to return to his pre-injury regular job of working in the intestine room.
2. The claimant has been working light duty assigned by the respondent.
3. The claimant is under restrictions.
4. The claimant has ongoing physical problems with his hands.
5. The claimant has suffered a loss of wage earning capacity in the future in that he can only do light duty assigned by respondent. This is evidenced by the numerous jobs claimant has tried, unsuccessfully, with the respondent.²

Respondent contends the ALJ's Award should be affirmed in all respects. Respondent contends the ALJ correctly ruled that the measure of disability in cases of occupational disease is solely the extent of loss of earning capacity and that in this instance, claimant has continued to make at least as much as he was earning at the time of his accident. Thus, he is entitled to no additional monetary recovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be modified.

The facts are well known to the parties and are not in dispute. Claimant began his employment with respondent in 1988. He was originally assigned to work in the intestine room trimming fat. In 1991 or 1992, he noticed his hands were red and itching. He reported this to the plant nurse and in 1992, he was referred to a doctor. Thereafter, he was reassigned to a light duty job in the paint room where he worked for approximately 2 years. He was then returned to the intestine room and assigned to cleaning the intestines.

Claimant's symptoms continued so he was reassigned to washing cows and later to the laundry room. After 4 years in the laundry room he was reassigned to sharpening knives. This last reassignment was for respondent's convenience and was not done pursuant to any physician's direction. Claimant continues to remain in respondent's employ sharpening knives. He maintains his symptoms wax and wane, with pain and swelling in both hands and that he is limited in his grip strength.

² Claimant's Brief at 5 (filed Oct. 25, 2004).

Dr. Peter Bieri testified that claimant suffers from contact dermatitis as a result of work activities and based upon his examination and evaluation, claimant bears a 10 percent permanent partial disability to the whole body under the 4th edition of the *Guides*.³

Under the occupational disease statute K.S.A. 44-5a01(a) an occupational disease shall be treated as the happening of an injury by accident, and the employee shall be entitled to compensation for such disablement in accordance with the provisions of the workers compensation act, as in cases of injuries by accident. Unfortunately, the occupational disease section of the Act provides no instruction on computing benefits available to a worker for an occupational disease.⁴ The only provision under the occupational disease statute dealing with the determination of amounts of compensation is found at K.S.A. Furse 1993 44-5a04, which provides as follows:

(b) The administrative law judge may cancel the award and end the compensation if the administrative law judge finds that the employee (1) [h]as returned to work for the same employer in whose employ the employee was disabled or for another employer and is capable of earning the same or higher wages than the employee did at the time of the disablement, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of disablement . . .

Similar language is found in the review and modification statute that relates to accidental injuries.⁵

The Kansas Supreme Court in *Hill*⁶ dealt with the issue of functional impairment from synovitis that resulted from an occupational disease. The *Hill* Court allowed the claimant to retain the 7.5 percent functional impairment award granted under the occupational disease claim even though there was no wage loss. The Board has followed this rationale and has concluded K.S.A. 44-510e,⁷ the statute that mandates a minimum recovery of the functional impairment for compensable injuries, is equally applicable to both

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁴ *Slack v. Thies Development Corp.*, 11 Kan. App. 2d 204, 718 P.2d 310, rev. denied 239 Kan. 694 (1986).

⁵ K.S.A. 44-528(b).

⁶ *Hill v. General Motors Corporation*, 214 Kan. 279, 519 P.2d 608 (1974).

⁷ In 1987, the Legislature amended K.S.A. 44-510e and expressly stated that permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment was further defined as meaning the extent, expressed as a percentage, of the loss of the total physiological capabilities of the human body as established by competent medical evidence.

personal injury claims as well as occupational disease claims where functional impairment exists in spite of the lack of demonstrable wage loss.⁸

In this instance, claimant remains employed by respondent and has an income that is comparable to or greater than the wages he was earning at the time of disablement. As such, the Board finds, pursuant to K.S.A. Furse 1993 44-5a04, claimant is entitled to no work disability as a result of the occupational disease suffered while employed with respondent. This is consistent with the recovery allowed for those employees who suffer permanent injury but are able to return to comparable employment. In spite of their comparable wage, they are entitled to recover their functional impairment. Similarly, the Board finds that a claimant who has no demonstrable diminution of earning capacity as a result of his occupational disease is nonetheless entitled to his functional impairment.

The only evidence as to claimant's functional impairment is that offered by Dr. Bieri, 10 percent to the body as a whole. The Board adopts his impairment assessment as its own. The ALJ's Award is hereby modified to reflect the 10 percent whole body permanent partial impairment.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 10, 2004, is reversed and modified as follows:

The claimant is entitled to 41.5 weeks of permanent partial disability compensation at the rate of \$278.25 per week or \$11,547.38 for a 10 permanent partial disability, making a total award of \$11,547.38.

As of February 17, 2005 there would be due and owing to the claimant permanent partial disability compensation at the rate of \$278.25 per week in the sum of \$11,547.38 for a total due and owing of \$11,547.38, which is ordered paid in one lump sum less amounts previously paid.

⁸ *Wright v. Plunkett Feedlot*, No. 173,322, 1998 WL 780843 (Kan. WCAB Oct. 30, 1998);
Magallenez v. IBP, Inc., No. 160,145, 1995 WL 781816 (Kan. WCAB Dec. 19, 1995).

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director